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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 675

VERNA MAE BIHN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 33–46) have not yet been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered November 15, 1945 (R. 45–46). The petition for a writ of certiorari was filed December 17, 1945. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court's charge to the jury did, in fact, impose on petitioner the burden of proving her innocence by showing that some other person stole the gasoline ration coupons involved in the conspiracy charged in the indictment.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of require-

ments for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person

shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

## STATEMENT

Petitioner and George Wesley Bennett were charged in a one-count indictment filed in the United States District Court for the Southern District of New York with conspiring to violate the rationing laws by unlawfully acquiring, possessing, and transferring gasoline ration coupons (R. 4–6). The indictment charged that it was a part of the conspiracy that petitioner would steal gasoline ration coupons from the First National Bank of Poughkeepsie, transfer them to Bennett, and share with Bennett the money obtained from the sale of the coupons. After a jury trial in which the defendants were found guilty (R. 3, 23), petitioner was sentenced to imprisonment for one year and one day (R. 3, 24), and on appeal by petitioner alone to the Circuit Court of Appeals for the Second Circuit, her conviction was affirmed, one judge dissenting (R. 33–46).

No error is claimed "in the admission, receipt or exclusion of evidence during the trial" (Pet. 7), nor does petitioner challenge the sufficiency of the evidence to support the verdict. Proper consideration of petitioner's contention that the trial court committed prejudicial error in instructing the jury, however, requires a statement

of parts of the evidence adduced against her at the trial.[1]

Petitioner was employed at the First National Bank of Poughkeepsie where her duties "were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government" (R. 8). Petitioner would receive from the bank's tellers the ration currency deposited with them by the bank's clients (R. 10); would make daily entries in the bank's books of these deposits (S. M. 125, 127, R. 10), and would place the gasoline ration coupons in a steel letter file, the keys to which were kept in petitioner's unlocked desk. A number of other employees "had access to and the occasion to go to said steel file * * * and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves * * *," and "if the ration bookkeeper [petitioner] was not present to furnish information or ration tokens, another employee would take care of the client" (R. 10). Every two weeks petitioner would take from the

[1] The record on appeal contained a "Stipulation of Agreed Facts" (R. 7–11) in the opening paragraph of which it was agreed "that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal." The printed record in this Court contains the same "Stipulation of Agreed Facts" (R. 7–11). The original stenographic copy of the minutes of the trial has also been filed with the clerk, and references thereto are indicated by S. M.

steel file the accumulated gasoline ration coupons and tokens and place them in a cardboard box. At first these were destroyed at the city incinerator. Later they were forwarded to the Office of Price Administration in New York, together with a form showing the contents of the box. In preparing the form, petitioner would not make an actual count of the coupons and tokens but would compile the figures from the daily deposit and recapitulation sheets. (S. M. 81.) Early in September 1944, petitioner prepared a box of ration currency for shipment to the Office of Price Administration, sealed it, and turned it over to the cashier, together with the necessary form, for the cashier's signature, which represented on the face thereof that the box contained, among other things, gasoline rationing currency for 156,795.5 gallons. The cashier did not sign the form but held it, and the box, for examination that night by the bank's auditors. Their examination disclosed that there was gasoline ration currency for only 119,772 gallons in the box, or a shortage of 37,023.5 gallons. (R. 10–11; S. M. 82, 84, 85.)

From August 1943 until February 1944—during petitioner's employment at the bank—defendant Bennett lived with petitioner and her husband in their three-room apartment in Poughkeepsie (R. 7–8). In February 1944 defendant Bennett married, and moved to the home of his mother-

in-law, Mrs. Howe (R. 8). In May 1944, an altercation occurred in front of Bennett's new home. Present were Bennett and his wife, his mother-in-law, his sister-in-law, and the petitioner. Mrs. Howe, after asking petitioner to leave, told petitioner that "if she didn't leave us alone, I would be forced to notify the Federal Bureau of Investigation, that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." To this, petitioner replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too." (R. 9.)[2]

## ARGUMENT

Contrary to the view of the dissenting judge (R. 44–45) below and the argument of petitioner here (Pet. 14–15), we think that this case, like the recent case of *United States* v. *Rubenstein* in the Second Circuit, 151 F. 2d 174, certiorari denied November 13, 1945, No. 449, does not involve any issue as to the permissible limits of a federal

[2] There was other evidence, in the form of statements made by Bennett before the grand jury, which was admitted only as against him (S. M. 117–119), to the effect that during the period he lived with petitioner and her husband, petitioner brought home and gave to Bennett on approximately ten occasions an average of 300 to 500 gasoline ration coupons which Bennett sold, dividing the proceeds with petitioner. These statements were admitted as an exhibit and are not reproduced in the stenographer's transcript. They are summarized in the stipulation of agreed facts (R. 8).

appellate court's discretion to disregard error which it considers to have been harmless to the defendant. The majority decision is bottomed squarely upon the view that the portion of the trial judge's instruction complained of—"Did she [petitioner] steal them [ration stamps]? Who did if she didn't? You are to decide that" (R. 18)—did not, in its context, constitute error; that "the language used is not, we think, ambiguous in its setting or reasonably to be understood to mean that the appellant had the burden to prove anything as a condition upon her acquittal" (R. 39). Indeed, the majority expressly conceded that "If the charge is fairly open to such an attack reversible error was committed, for of course the appellant had no burden to prove anything but was presumed to be innocent and was entitled to be acquitted if the evidence as a whole was merely too inconclusive to prove her guilt to the satisfaction of the jury beyond a reasonable doubt" (R. 38).

Thus, in this case, as in *Rubenstein's, supra,* the issue is whether there was error at all, and not whether the court below erroneously extended the harmless error principle.

Petitioner contends (Pet. 8–12), as did the dissenting judge below (R. 42–44), that the trial court "shifted the burden of proof, requiring [her] to exculpate herself" (Pet. 8), when, in commenting on the theft of the ration coupons which were missing from the box examined by the

bank's auditors, the court asked the rhetorical questions quoted above as to who stole the coupons. Petitioner argues that these statements are construable as instructing the jury to "decide who stole the ration coupons if appellant [petitioner] didn't" (Pet. 9), and that they constitute error, as indicated in the dissenting opinion below, by imposing on petitioner "the burden of proving her innocence by proving the identity of some other person as the thief" (Pet. 11; R. 43). But "it is elementary that the instruction as a whole must be considered when error is assigned to a portion thereof,"[3] and we submit that from the charge in its entirety the jury could not have had any impression other than that the defendants were not to be found guilty unless the prosecution had proved to the jury's satisfaction, beyond a reasonable doubt, the existence of a conspiracy as charged and commission of an overt act. Throughout the charge, which comprises about ten pages of the printed record (R. 11–23), the court emphasized that the jury must find from the evidence that the Government had established beyond a reasonable doubt that a conspiracy existed and that an overt act in pursuance thereof had been committed. In the instructions preceding the sentences relied upon as

[3] *Mansfield* v. *United States*, 76 F. 2d 224, 229 (C. C. A. 8), certiorari denied, 296 U. S. 601, citing *Carnahan* v. *United States*, 35 F. 2d 96 (C. C. A. 8); see also *Bandy* v. *United States*, 245 Fed. 98, 100 (C. C. A. 8).

error, the court, after reading the indictment (R. 11–12), correctly instructed the jury concerning the presumption of innocence, reasonable doubt (R. 13) and the elements of conspiracy (R. 14–15), admonishing them that the defendants could not be found guilty unless the prosecution had proved beyond a reasonable doubt that they were "guilty of a corrupt agreement and the performance of an overt act to carry out the agreement" (R. 16). The court then adverted to the theory of the prosecution that pursuant to the conspiracy charged, petitioner was to steal the ration stamps from the bank and give them to Bennett, who would sell them and divide the money with petitioner (R. 17). Following this, the court called the jury's attention to petitioner's denial in her testimony that she was implicated in the theft of the stamps and to her claim that other people in the bank had access to them, at the same time, however, referring to the fact that she had charge of the stamps and that it was her responsibility to prepare an accurate account of them when they were sent in to the O. P. A. (R. 17–18).[4] It was at this point in the charge that the court said (R. 18–19):

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[4] Petitioner asserts (Pet. 12) that in this latter portion of the instructions the court disparaged her claim that someone else might have committed the theft. However, the court in these comments had called the jury's attention to petitioner's strongest defense, and it was not unfair comment to advert in this connection to her duties in respect of the ration stamps.

> Who would have a motive to steal them? Did she take those stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Following these comments, the court instructed the jury, *inter alia* (R. 20):

> Consider all those phases. You have to decide it. Were these two defendants engaged in a conspiracy to do any of the things charged, to acquire unlawfully these coupons, to possess them unlawfully, to transfer them, to steal them from the bank?
>
> Did they agree and conspire as to that and did they perform an overt act? If so, they would be guilty. You are to say by your verdict.
>
> A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt. If the facts and circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty. If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

It is obvious, we believe, from a reading of the charge in its entirety that the jury could not have been misled or confused by the statements complained of.[5] As this Court said in *Evanston* v. *Gunn*, 99 U. S. 660, 668: "* * *. Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled * * *". All the parts of an instruction "must be considered together and excerpts or particular parts should not be separated and considered apart from the whole." *Graham* v. *United States*, 120 F. 2d 543, 546 (C. C. A. 10). See also *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *United States* v. *Greenbaum*, 123 F. 2d 770, 773 (C. C. A. 2); *Lewis* v. *United States*, 74 F. 2d 173, 177–178 (C. C. A. 9); *Shook et al.* v. *United States*, 10 F. 2d 151 (C. C. A. 5), certiorari denied, 271 U. S. 666. In the light of the full charge and the immediate context of the court's comments on the evidence and the theories of the prosecution and petitioner's defense, we do not think it can be said that the

[5] The failure of petitioner's trial counsel to press his objection, when he saw that the trial judge did not comprehend it, that the instruction in question put upon petitioner the onus of proving who stole the coupons if she did not (R. 21-22), is hardly consistent with petitioner's argument as to the serious effect of the alleged error.

rhetorical questions as to who stole the stamps imposed upon petitioner a burden to prove that someone else stole them in order to exculpate herself. As the majority below said, "The fair import of such language is not that the jury had to determine who in fact stole the coupons if it failed to find that she did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged" (R. 39–40).

## CONCLUSION

There was no error in the trial court's charge to the jury and hence no meritorious question or conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
*Solicitor General.*

THERON L. CAUDLE,
*Assistant Attorney General.*

ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
*Attorneys.*

January 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946